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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1989

BARBARA JUNGEN,
Administratrix of the Estate
of Alfred John Jungen, and
FREMONT INDEMNITY
COMPANY, a California
corporation

Petitioners-Appellants,

vs.

STATE OF OREGON

Respondent-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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QUESTIONS PRESENTED

I. WHETHER OREGON REVISED STATUTES 30.265(3)(a) VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY DENYING PETITIONER'S (BARBARA JUNGEN) RIGHTS TO EQUAL PROTECTION AND IS THEREFORE UNCONSTITUTIONAL WHERE IT DENIES PETITIONER, A RECIPIENT OF CALIFORNIA WORKER'S COMPENSATION INSURANCE BENEFITS, THE RIGHT TO SUE THE STATE OF OREGON FOR TORTS AND RECOVER FULL COMPENSATION, EVEN THOUGH THE SAME STATUTE WOULD ALLOW PERSONS COVERED BY ANY OTHER INSURANCE THE RIGHT TO SUE THE STATE UNDER THE SAME SET OF FACTS.

II. WHETHER OREGON REVISED STATUTES 30.265(3)(a) VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY DENYING PETITIONER'S (FREMONT INDEMNITY COMPANY) RIGHT TO EQUAL PROTECTION AND IS THEREFORE UNCONSTITUTIONAL WHERE IT DENIES PETITIONER, A CALIFORNIA WORKERS COMPENSATION INSURANCE CARRIER, ITS SUBROGATION RIGHT TO SUE THE STATE OF OREGON FOR TORTS, EVEN THOUGH THE SAME STATUTE WOULD ALLOW CARRIERS OF ANY OTHER INSURANCE THEIR SUBROGATED RIGHTS TO SUE THE STATE UNDER THE SAME SET OF FACTS.

III. WHETHER OREGON REVISED STATUTES 30.265(3)(a) VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION AND IS THEREFORE UNCONSTITUTIONAL WHERE IT MAKES DOING BUSINESS IN OREGON MORE COSTLY AND RISKY FOR OUT OF STATE PERSONS, INCLUDING WORKERS COMPENSATION INSURANCE CARRIERS, WHERE THEY CANNOT RECOVER FULL DAMAGES NOR BE REIMBURSED FOR WORK RELATED INJURIES CAUSED BY THAT STATE, ALTHOUGH THEY CAN RECOVER IN ALL OTHER STATES.

TABLE OF CONTENTS

Pages

Questions Presented i

Table of Contents ii

Table of Authorities Cited iii

Opinions Below 1

Statement of Jurisdiction 2

Statement of Case 2

Argument 8

Conclusion 22

Appendix A - Order Denying Review.....App. 1

Appendix B - Appeal From Circuit Court, Douglas County.....App.2

Appendix C - Order Denying Reconsideration.....App.10

Appendix D - Stipulation Vacating Prior Judgment. and Entering New Order and Judgment of Dismissal.....App.11

TABLE OF AUTHORITIES

Pages

CASE:

Bernthal v. City of St. Paul, 376 N.W. 2d 422 (1985) 11, 15, 18, 22, 23

Dohoney v. Port of Portland, 34 Or App 923, 568 P.2d 705 (1977) 12, 13, 14

Edwards v. State Military Dept., 8 Or App 610, 494 P.2d 891 (1972) 12

Gibbons v.Ogden, 22 U.S. 1, 6 L. Ed. 23 (1824) 19

H.P. Hood & Sons v. DuMond, 336 U.S. 525, 69 S.Ct. 657 (1949) 20

Pike v. Bruce Church, Inc., 397 U.S. 137, 141 90 S.Ct. 844, 847 (1970) 19, 21

Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1982).....9, 10

Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971) 10

Western and Southern Life Insurance Co.v. State Board of Equalization of California, 451 U.S. 648, 101 S.Ct. 2070 (1981) 10

Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461 (1955) 10

Wilson v. Blake Creek Marsh Company, 27 U.S. 245, 7 L.Ed. 412 (1829) 19

STATUTE:

28 USC §1257(a).....2

California Insurance Code § 11662 17

California Labor Code § 3852 17

California Labor Code § 3854 17

Minn. Stat. sec. 466.03, subd. 2 11

Oregon Revised Statutes

30.020.....16

30.265.....12, 13

30.265(3)(a).....5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23

30.260-30.300, Oregon Tort Claims Act.....8

276.598.....9

656.576.....17

Oregon Constitution Article I, Section 10 16

United States Constitution

Article I, section 8, Commerce Clause 5, 7, 19, 23

Fourteenth Amendment 8, 9, 17

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OPINIONS BELOW

The Order of the Supreme Court of Oregon denying the Petition for Review is unreported, and is reproduced as Appendix A, App. 1. The Opinion of the Court of Appeals of Oregon is reported at 94 Or App 101, 764 P.2d 938, and is reproduced as Ap-

pendix B, App. 2-9. The Denial of the Petition for Reconsideration by the Court of Appeals is unreported, and is reproduced as Appendix C, App. 10. The Order and Judgment of Dismissal of the Circuit Court of the State of Oregon for the County of Douglas appealed to the Court of Appeals of Oregon is unreported, and is reproduced as Appendix D, App. 11-12.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Oregon was filed November 23, 1988, and the Petition for Reconsideration was denied March 24, 1989. On April 18, 1989, the Supreme Court of Oregon denied the Petition for Review. Jurisdiction of this Court is invoked under 28 USC §1257(a).

STATEMENT OF THE CASE

Alfred Jungen, an employee of a California corporation, was fatally injured September 17, 1985, when the tractor-trailer vehicle he was driving overturned on an Oregon state highway. He was driving on Highway 99 southeast of Winston, Oregon when he failed to negotiate a curve. His vehicle left the roadway,

and overturned. Rescuers were unable to extricate him from the wreckage before he died.

Fremont Indemnity Company, a California corporation[1], was the workers' compensation carrier for his employer, and paid benefits to his surviving spouse, Barbara Jungen. As Administratrix of his Estate, Barbara Jungen brought this wrongful death action against the State of Oregon on behalf of herself and Anita L. Gano, the mother and only other heir under Oregon law of decedent. Fremont Indemnity Company was named as a plaintiff seeking reimbursement under its statutory right of subrogation.

Petitioners first amended complaint for wrongful death and indemnity was filed May 29, 1987, alleging the highway on which Alfred Jungen died was negligently, defectively, and oth-

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[1] Fremont Indemnity Company is owned by Fremont Insurance Group, Inc. which also owns Fremont Reinsurance Company, Comstock Insurance Company, Facultative Managers Corp., Fremont Leasing Corp., and Lemac and Associates, Inc. Fremont Insurance Group, Inc. is owned by Fremont General Corporation. Fremont Indemnity Company owns Fremont Administrative Services Corporation, Fremont Compensation Insurance Company, Fremont Insurance Company (U.K.) Limited, Fremont Reinsurance Company, Ltd. (Bermuda), The Fremont Syndicate, Inc. and R.I.C. Insurance General Agency, Inc.

erwise improperly designed, planned, constructed, and maintained by the State of Oregon. In particular, the highway was improperly signed as to speed and the nature of the curve of the highway. The curve had a rapidly decreasing radius with insufficient sight distance and improper grading all of which created a trap for the unwary motorist. The complaint also alleged the State failed to follow its own regulations regarding proper placement of signs in advance of the curve, and that this failure constituted a breach of a mandatory duty.

Fremont Indemnity Company's cause of action alleges that Alfred Jungen's employer was covered by the workmens' compensation laws of California, and his surviving spouse received benefits thereunder. Under Alfred Jungen's contract of employment and his employer's insurance policy, the provision of death benefits acts as an assignment and/or subrogates to the payor of death benefits the right to pursue reimbursement or subrogation from third parties whose negligent actions caused the death of Alfred Jungen. Fremont Indemnity Company was the payor of said death benefits.

On June 3, 1987, the State of Oregon served a motion to dismiss for failure to state ultimate facts sufficient to constitute a claim. Therein, respondent contended it was immune from liability pursuant to Oregon Revised Statute 30.265(3)(a) which provided that every public body is immune from liability for any claim for injury to or death of any person covered by any workers' compensation law.

Petitioners filed their opposition June 19, 1987, arguing that the statute was unconstitutional in that it denied the right to equal protection because it singled out a class of plaintiffs (workers covered by workers' compensation, their heirs and workers' compensation insurance carriers) and denied that class the right to sue governmental entities for tortious injuries. Petitioners further argue the statute was violative of the commerce clause of the United States Constitution since it increased the cost of supplying goods and services within or through the state and thereby affected commerce between the states.

Respondent's motion to dismiss was granted August 7, 1987. An order and judgment of dismissal was signed August 18, 1987, but was later vacated and a new order and judgment of dis-

missal was filed September 11, 1987, and entered September 15, 1987. (App.11-12) Petitioners appealed that judgment and on November 23, 1988, the Court of Appeals of Oregon affirmed the judgment. (App.2-9)

On March 24, 1989, the Court of Appeals of Oregon denied petitioners' Petition for Reconsideration. (App. 10) The Supreme Court of Oregon denied petitioners' Petition for Review on April 18, 1989. (App. 1).

For the reasons set forth herein, petitioners contend the Supreme Court of Oregon erred by not granting the Petition for Review and that the Court of Appeals of Oregon erred in affirming the judgment granting the state's motion to dismiss. Dismissal was based on the argument the State of Oregon was immune from liability under Oregon Revised Statute 30.265(3)(a). Petitioners contend the statute is unconstitutional in that it singles out a class of plaintiffs (beneficiaries covered by workers' compensation insurance) and denies them (and their subrogated insurance carriers) the right to sue governmental entities for tortious injuries, even though persons covered by all other forms of insurance would have the right to sue governmental entities under the same

set of facts. The only difference is the source of insurance coverage. This artificial classification does not serve a legitimate purpose, nor is there a rational basis for it.

Petitioners also contend the statute violates the commerce clause of the United States Constitution since it increases the cost of doing business within Oregon for out of state employers and workers' compensation insurance carriers. The increase occurs where employers or their insurance carriers cannot be reimbursed for tortious injuries caused by governmental entities in Oregon, and costs in general for persons doing business in Oregon would increase.

The facts and issues were raised fairly before the Court of Appeals of Oregon and presented to the Supreme Court of Oregon and their decisions should be reversed. Oregon Revised Statutes 30.265(3)(a) should be declared to be in violation of the Fourteenth Amendment and commerce clause of the United States Constitution. The Opinion of the Court of Appeals of Oregon should be reversed, vacated, and remanded with directions to the

Circuit Court of Oregon for the County of Douglas to vacate the judgment and to deny the motion to dismiss filed therein.

ARGUMENT

I. OREGON REVISED STATUTE 30.265(3)(a) VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY DENYING THE RIGHTS OF PETITIONER BARBARA JUNGEN TO EQUAL PROTECTION, AND IS THEREFORE UNCONSTITUTIONAL WHERE IT DENIES PETITIONER (A RECIPIENT OF CALIFORNIA WORKERS' COMPENSATION INSURANCE BENEFITS) THE RIGHT TO SUE THE STATE OF OREGON FOR TORTS AND RECOVER FULL COMPENSATION, EVEN THOUGH THE SAME STATUTE WOULD ALLOW PERSONS COVERED BY ANY OTHER INSURANCE THE RIGHT TO SUE THE STATE UNDER THE SAME SET OF FACTS.

The Fourteenth Amendment of the United States Constitution provides:

> "No state shall deny to any person within its jurisdiction the equal protection of laws."

Under the Oregon Tort Claims Act (Oregon Revised Statutes 30.260-30.300), every public body is liable for its torts

and those of its officers, employees and agents, acting within the scope of their employment or duties; however, Oregon Revised Statute 30.265(3)(a) provides an exception:

> "Every public body and its officers, employers and agents acting within the scope of their employment or duties, or while operating a motor vehicle in a ride sharing arrangement authorized under ORS 276.598, are immune from liability for:
>
> (a) any claim for injury to or death of any person covered by any workers compensation law.
>
> ***."

Oregon Revised Statutes 30.265(3)(a) (hereinafter referred to as "ORS 30.265(3)(a)"), denies the right of equal protection under the Fourteenth Amendment of the United States Constitution in that it denies recipients of workers' compensation benefits from suing Oregon governmental entities, allowing beneficiaries of all other forms of insurance the right to sue.

The equal protection clause of the Fourteenth Amendment was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382 (1982). It denies the state the power to legislate that different treatment be accorded to persons placed by

statute into different classes on a basis of criteria wholly unrelated to the objective of that statute. *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251 (1971). It extends to anyone, citizen or stranger, who is subject to the laws of the state. *Plyler vs. Doe, supra.*

The equal protection guarantee requires that persons similarly situated be treated alike, unless a rational basis exists for discriminating among them. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461 (1955). The statutory classification must rest on some ground of difference having fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike. *Reed v. Reed, supra.* In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, two questions must be answered: 1) does the challenged legislation have a legitimate purpose, and 2) was it reasonable for the lawmakers to believe that use of the challenge classification would promote that purpose? *Western and Southern Life Insurance Co. v. State Board of Equalization of California,* 451 U.S. 648, 101 S. Ct. 2070 (1981).

In *Bernthal v. City of St. Paul*, 376 N.W. 2d 422 (1985), the Minnesota Supreme Court, en banc, declared a virtually identical statute to violate the equal protection guarantee of the United States Constitution. The court was asked to decide the constitutionality of Minn. Stat. sec 466.03, subd. 2, which provided immunity from suit in tort for municipalities when the tort victim is covered by the Workers' Compensation Act. The plaintiff, a privately employed person who received workers' compensation insurance, sued the city for negligent design and maintenance of a street. The city's motion for summary judgment on the grounds of municipal immunity was granted. The Minnesota Supreme Court reviewed the immunity statute. In deciding that the statute was unconstitutional, the court stated:

> "...(B)ecause the provision does not prevent victims covered by private insurance from bringing suit, the classification is based solely upon the source of the victims' insurance benefits. Such a distinction bears no rational relation to either of the proffered objectives of the statute." (at 426)

The statute's objectives, as analyzed by the court were (1) to make sure municipal funds expended as a result of tort judgments inured

primarily to the actual victims rather than their insurers, and (2) to protect the financial stability of municipalities. The court said:

> "There is nothing to suggest that tort victims covered by workers' compensation insurance are any different from victims covered by any other insurance. . . .We can conceive of no rational reason to justify the distinction made by section 466.03, subd. 2." (at 426)

Review of Oregon cases reveals there is no clear legislative purpose for ORS 30.265(3)(a). In *Edwards v. State Military Dept.*, 8 Or App 610, 494 P. 2d 891 (1972), the appellate court examined ORS 30.265[2] (since amended). At the outset, it commented that the doctrine of sovereign immunity imposed hardships upon citizens negligently injured by government employees, forcing them to bear fully the cost of their injuries. The court then observed that tort liability laws abrogating sovereign immunity provide a means for distributing losses over a broad

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2 ORS 30.265 provided "(2) Every public body is immune from liability for: . . .(b) Any claim for injury to or death of any person covered by the Workmen's Compensation Law. . . ." (Emphasis added.) After a successful suit was filed by a worker covered by out of state workers' compensation insurance (see *Dohoney v. Port of Portland*, 34 Or App 923, 568 P.2d 705 (1977), the statute was amended by replacing "the Workmen's Compensation Law" with "any Workmen's Compensation Law."

group, i.e., the taxpayers. But, when an alternative system for distributing losses exists, there is little reason to distribute the loss by abrogating sovereign immunity. When considering why governmental immunity should be preserved against persons covered by workers compensation insurance and not against persons covered by other insurance, the court speculated that the legislature "may" have concluded it was best to confine the exception to a compensation system with which it was familiar--one which it had created. The court concluded the classification in question was reasonable.

There are no further cases discussing the legislative purpose or rational basis of the present version of ORS 30.265, which now broadens the exception to encompass "any workmens' compensation law" including compensation systems which are unfamiliar and which the state did not create. Before, the exception was narrowly drawn and confined to only those individuals covered by the Oregon Workmens' Compensation Law. The broadened version was a response to the case of *Dohoney v. Port of Portland*, 34 Or App 923, 568 P.2d 705 (1977). In *Dohoney v. Port of Portland, supra*, the phrase "the Workmens'

Compensation Law" in ORS 30.265(2)(b) [now ORS 30.265(3)(a)] was regarded as "a plain and unambiguous reference to the Oregon's Workmens' Compensation Law". Therefore, in *Dohoney, supra,* a Washington worker who received benefits under the Washington Industrial Accident Law, but who was injured while working temporarily in Oregon, was not prohibited from bringing suit against the Port of Portland, a public body. Subsequently, the legislature amended the Oregon statute so as to refer to "any" rather than "the" Workmens' Compensation System. This amendment now broadened the more restrictive immunity originally created by the legislature. It therefore took away the right to sue the State of Oregon by an injured party with out-of-state workers' compensation benefits. This is no longer a question of the legislature granting a limited right to sue by partial abolishment of sovereign immunity. Rather, it is the taking away of a right to sue granted to out-of-state workers' compensation beneficiaries by the original legislation abolishing sovereign immunity. Initially, the Oregon legislature granted these persons the right to sue. Then after the *Dohoney v. Port of Portland, supra* case, the legislature took this right away without

any rational basis for it. The only plausible reason was to reduce the number of lawsuits filed in the state by eliminating a specific class of persons. Such legislation is arbitrary, capricious and overly broad.

Because of the artificial classification created by ORS 30.265(3)(a), the petitioner is deprived of her right to full compensation. She cannot recover full general damages as can other tort victims, who are covered by all other forms of insurance. Petitioner's recovery is limited to those benefits provided by California Workers' Compensation law, even though the State of Oregon is at fault. As the court stated in *Bernthal v. City of St. Paul, supra* at 426, such benefits were not intended to compensate all damages an injured party might sustain. Damages above medical, health care and wage loss are limited to a certain degree by the Workers' Compensation Act. Such benefits will not fully compensate petitioner. This situation in which petitioner finds herself illustrates the inequitable and discriminatory results caused by ORS 30.265(3)(a). And petitioner has no other remedy to recover full compensation for damages suffered.

The State of Oregon allows parents to maintain a cause of action for wrongful death (see ORS 30.020). Alfred Jungen's mother, Anita L. Gano, the decedent's only other heir, is denied the right to sue the State of Oregon for compensation because ALFRED JUNGEN was covered by workers' compensation insurance and ORS 30.265(3)(a) precludes such a suit. Anita L. Gano was not entitled to any workers' compensation benefits to help compensate for her injury and loss. She is now denied total recovery and has no remedy at law, even though Article I, Section 10 of the Oregon Constitution, provides that every man shall have remedy by due course of law for injury done him in his person, property or reputation.

II OREGON REVISED STATUTES 30.265(3)(a) VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY DENYING THE RIGHTS OF PETITIONER FREMONT INDEMNITY COMPANY TO EQUAL PROTECTION AND IS THEREFORE UNCONSTITUTIONAL WHERE IT DENIES PETITIONER (A CALIFORNIA WORKERS' COMPENSATION INSURANCE CARRIER) THE SUBROGATED RIGHT TO SUE THE STATE OF OREGON FOR TORTS, EVEN THOUGH THE SAME STATUTE WOULD ALLOW CARRIERS OF ANY OTHER INSURANCE THE RIGHT TO SUE THE STATE UNDER THE SAME SET OF FACTS.

Petitioner, Fremont Indemnity Company, a California workers' compensation insurance carrier, is completely denied its remedy at law, and it cannot recover reimbursement under its statutory subrogation rights, as allowed by California Labor Code §§ 3852 and 3854 and California Insurance Code § 11662 and by Oregon Revised Statutes 656.576, et seq. This denial is illustrative of the inequitable and discriminatory effect of ORS 30.265(3)(a), which violates the equal protection guarantee of the Fourteenth Amendment to the United States Constitution. All other types of insurance carriers can sue the State of Oregon to obtain reimbursement of benefits paid. But without any rational basis for it, the Oregon legislature took away those same rights from workers' compensation insurance carriers.

As a result of ORS 30.265(3)(a), the workers' compensation insurance carrier must bear the entire financial burden for the wrong committed by the State of Oregon. The inequity and unfairness is more pronounced where an out-of-state carrier is involved, as in this case. Fremont Indemnity Company is forced to bear the financial burden in this case, even though it has no ties to Oregon and receives no benefits from the

state. This shift of financial burden has no rational basis.

To paraphrase the Minnesota Supreme Court in *Bernthal v. City of St. Paul, supra*, there is nothing in the statute or its legislative history to suggest that workers' compensation carriers are any different from any other insurance carrier.

Petitioner Fremont Indemnity Company is in a similar position as petitioner Barbara Jungen as to death benefits it has paid. It has subrogated rights and stands in the shoes of its insured-employee and his beneficiaries. Because of ORS 30.265(3)(a), Fremont Indemnity Company has no remedy at law and has no recourse.

III. OREGON REVISED STATUTES 30.265(3)(a) VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION AND IS THEREFORE UNCONSTITUTIONAL WHERE IT MAKES DOING BUSINESS IN OREGON MORE COSTLY AND RISKY FOR OUT OF STATE PERSONS, INCLUDING WORKERS' COMPENSATION INSURANCE CARRIERS, WHERE THEY CANNOT RECOVER FULL DAMAGES NOR BE REIMBURSED FOR WORK-RELATED INJURIES CAUSED BY THAT STATE, ALTHOUGH THEY CAN RECOVER DAMAGES IN ALL OTHER STATES.

Article I, section 8 of the United States Constitution provides that Congress shall have the power to regulate commerce among the several states. This commerce clause has traditionally been interpreted as limiting the state's power to take action which affects interstate commerce. *Gibbons v. Ogden*, 22 U.S. 1, 6 L. Ed. 23 (1824); *Wilson v. Blake Creek Marsh Company*, 27 U.S. 245, 7 L.Ed. 412(1829).

The extent of burden upon interstate commerce which the courts will tolerate depends upon the nature of the state's interest, the even-handedness with which the regulation is applied, and whether it can be promoted with lesser impact upon interstate activities. The criteria for determining the validity of a state statute affecting interstate commerce is stated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141, 90 S.Ct. 844 , 847(1970):

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

In our case, the burden imposed on commerce is excessive and there are no legitimate putative local benefits

Although the court has recognized the legitimacy of an objective which seeks to protect the health and welfare of the citizens within the state, protection of the state's economic interest is generally considered not to be a legitimate state objective, where pursuit of that objective materially affects interstate commerce. *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 69 S.Ct. 657 (1949). The scope of ORS 30.265(3)(a) sweeps broadly so as to preclude claims of injury by drivers within the State of Oregon resulting from the failure of the state to comply with its highway safety standards. These drivers include operators of commercial vehicles involved in interstate commerce, as in this case, or anyone driving a motor vehicle or traveling by common carrier into or through the State of Oregon in the course and scope of their employment. Producers and manufacturers of goods outside of Oregon, whose goods either pass through the state or are destined for delivery within the state carry the burden of insuring their employees against the negligence of Oregon public entities without any possibility of indemnity. The effect of this shift of burden for the negligence of all public entities and its employees can only increase the costs of supplying goods or services within or

through the State of Oregon, thereby having a direct and significant impact upon commerce between the states.

If the legislative objective in enacting this statute was purely economic, it is not a legitimate objective when the statute has a direct and significant impact upon interstate commerce.

If the objective is deemed legitimate and the statute nondiscriminatory, the last step in the analysis is to analyze whether there might be a less burdensome alternative. *Pike v. Bruce Church, Inc., supra.* The legislature has seen fit within the Oregon Tort Claims Act to create certain exceptions to the general abrogation of sovereign immunity. The specific exception under scrutiny is very broad. The legislature could easily narrow its scope. The application of ORS 30.265(3)(a) could exempt from its application those civil actions involving injuries while occurring in the course or scope of interstate commerce or, even more broadly, injuries resulting from the state's failure to maintain safe highways or even as originally enacted, to exclude only Oregon workers' compensation cases.

ORS 30.265(3)(a) is in violation of the commerce clause of the United States Constitution in that it promotes a state eco-

nomic objective while having a substantial effect on interstate commerce, when less burdensome alternatives are available.

CONCLUSION

ORS 30.265(3)(a) is unconstitutional since it violates the right to equal protection. It denies persons who receive workers' compensation insurance benefits the right to sue a public entity, yet it allows persons who receive all other types of insurance benefits the right. As stated in *Bernthal vs. City of St. Paul, supra*, there is nothing to suggest that tort victims covered by workers' compensation insurance are any different from victims covered by any other insurance. This is especially inequitable since the workers' compensation system was not designed to fully compensate its beneficiaries to the same extent as the state's tort system. Even heirs receiving no workers' compensation benefits are denied the right to sue. Thus, the ORS 30.265(3)(a) is

discriminatory, and there is no rational basis or explanation for this artificial classification. There is no legitimate public purpose for the discrimination, nor does the statute accomplish any public objectives. The Minnesota Supreme Court decided that a similar statute was unconstitutional as there was no rational basis for the distinction and discrimination. See *Bernthal v. City of St. Paul, supra.*

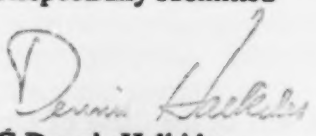
The statute also denies the workers' compensation insurance carrier the ability to sue under its statutory subrogation rights, thereby denying completely reimbursment for the wrongful acts of the State of Oregon. This shifts the financial burden from a wrongdoer (State of Oregon) to an innocent party which has no ties to Oregon nor receives any benefits from the state. However, the right to sue is given to all other types of insurance carriers. There is no rational or legitimate basis for this discrimination.

The statute violates the commerce clause to the United States Constitution and makes doing business in Oregon more costly. Where the workers' compensation insurance carrier or any other person, such as employers and other insurers, cannot

obtain reimbursement for the benefits it pays, its costs will rise and will be passed on. This will make doing business in Oregon more risky and costly. Less burdensome alternatives are available.

For reasons set forth above, petitioners Barbara Jungen and Fremont Indemnity Company respectfully request this Court to issue a Writ of Certiorari to the Supreme Court of the State of Oregon.

Respectfully submitted



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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OREGON

No.SC S35918
No.CA A45994

BARBARA JUNGEN, Petitioner ESTATE OF ALFRED JOHN JUNGEN FREMONT INDEMNITY CO Petitioner v. STATE OF OREGON, Respondent FREIGHTLINER WEST FOREST WOOD PRODUCTS CO.	*	ORDER DENYING REVIEW CA A45994 SC S35918

The Court has considered the petition for review and ORDERS that it be denied.

/S/ EDWIN J. PETERSON
CHIEF JUSTICE

Gillette, J., not participating

April 18, 1989

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF OREGON

No. CA A45994

BARBARA JUNGEN, Administratrix of the Estate of Alfred John Jungen, and FREMONT INDEMNITY COMPANY, a California corporation,	*	APPEAL FROM CIRCUIT COURT, DOUGLAS COUNTY,
	*	NO: L86-2634
Appellants	*	
vs	*	
STATE OF OREGON,	*	
Respondent	*	
FREIGHTLINER, a Delaware corporation and WEST FOREST WOOD PRODUCTS CO., an Oregon corporation,	*	
Defendants.	*	

Submitted: September 28, 1988
Filed: November 23, 1988

Before BUTTLER, Presiding Judge, and WARREN and ROSSMAN, Judges.

WARREN, Judge.

Plaintiffs appeal from an ORCP 67B judgment granting the state's motion to dismiss a claim on the ground that the state is immune from liability under ORS 30.265(3)(a).

Alfred Jungen, an employee of a California corporation, was fatally injured when the tractor he was driving overturned on an Oregon state highway. His employer's workers' compensation carrier paid benefits to his surviving spouse, who, as administratrix of his estate, brings this wrongful death action against the state, alleging that it negligently constructed and repaired the road. Fremont Indemnity Company, claiming that it is subrogated to the administratrix's rights, seeks reimbursement for the workers' compensation benefits it paid to the deceased's spouse.

ORS 30.265, a section of the Oregon Tort Claims Act, provides, in relevant part:

> "(1) Subject to the limitations of ORS 30.260 to 30.300 every public body is subject to action or suit for its torts and those of its officers, employees and agents acting within the scope of their employment or duties . .
>
> ". . .
>
> "(3) Every public body . . . [is] immune from liability for:
>
> "(a) Any claim for injury to or death of any person covered by any workers' compensation law."

Plaintiffs contend that subsection (3)(a) violates both Article I, section 20, of the Oregon constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by discriminating against persons receiving workers' compensation benefits. They argue that it precludes them from suing the state for pain, suffering, emotional injuries and loss of consortium, which are not recoverable under the Workers' Compensation law, but are recoverable by persons who are not covered by workers' compensation and who are allowed to sue the state. *See* ORS 30.020.

Plaintiffs make the same arguments in support of both their state and federal claims. They argue, first, that Article I, sections 1 and 10,[1] of the Oregon Constitution create an "important" or a "fundamental" right guaranteeing to each person "the right to sue for all compensable components of personal injury." They urge us to apply strict judicial scrutiny to determine if subsection (3)(a) narrowly accomplishes a compelling state purpose. Plaintiffs acknowledge that we rejected an Article I, section 20 constitutional challenge of an earlier version of that subsection in *Edwards v. State Military Dept.*, 8 Or App 620, 494

P2d 891, *rev den* (1972), where we held that the classification was reasonable and did not offend the equal protection guarantees of the Oregon or United States Constitutions. 8 Or App at 626; *see also Millspaugh v. Port of Portand*, 65 Or App 389, 394, 671 P2d 743 (1983), *rev den* 296 Or 411 (1984). They argue, however, that *Edwards* is not dispositive in this case, because there we applied the rational basis standard of review and not strict judicial scrutiny, which they contend is warranted here because a "fundamental right" is involved. They also contend that the statute does not satisfy the rational basis standard of review. Alternatively, they argue that under the "balancing test" of *Olsen v. State ex rel Johnson*, 276 Or 9, 20, 554 P2d 139 (1976), the detriment caused to them by subsection (3)(a) outweighs the state's justification.

We address plaintiffs' state constitutional claim first. We consider plaintiffs Article I, section 20[2] challenge, despite our earlier decision in *Edwards v. State Military Dept.*, *supra*, because the Oregon Supreme Court has altered its Article I, section 20 analysis since we issued that decision. The court in *Olsen v. State ex rel Johnson*, *supra*, announced a "balancing test" approach in

place of the federal "fundamental rights" analysis. Although the court has not explicitly rejected the *Olsen* test, it has not in recent years applied it to an Article I, section 20, challenge. *See* Schuman, "The Right to Equal Privileges and Immunities: A State's Version of 'Equal Protection,'" 13 Vt L Rev 221, 228 n 43 (1988).[3] Therefore, we turn to its current analysis, as articulated, in part, in *State v. Clark, supra* n 3, 291 Or at 240. In order to succeed, plaintiffs must show, (1) that another group has been granted a "privilege" or "immunity" which their group has not been granted, (2) that subsection (3)(a) discriminates against a "true class" on the basis of characteristics which they have apart from that statute, *Hunter v. State of Oregon, supra* n 3, 306 Or at 533; *State v. Clark, supra* n 3, 291 Or at 240, and (3) that the distinction between the classes is either impermissibly based on persons' immutable characteristics, which reflect "invidious" social or political premises, or has no rational foundation in light of the state's purpose. *Van Daam v. Hegstrom*, 88 Or App 40, 43-44, 744 P2d 269 (1987), *rev den* 305 Or 433 (1988).

The opportunity to sue the state is a "privilege" which subsection (3)(a) denies to persons who have recovered workers'

compensation benefits. By doing so, it discriminates against a "true class" and therefore, is subject to Article I, section 20 scrutiny. The distinction drawn between persons receiving workers' compensation benefits and those not receiving benefits is established by workers' compensation laws, *see* ORS 656.001 *et seq*, and exists independently of subsection (3)(a). *Van Daam v. Hegstrom, supra*, 88 Or App at 45. That distinction is not based on immutable personal characteristics, such as race or gender. Accordingly, plaintiffs must show that subsection (3)(a) is not rationally related to a legitimate state purpose. Plaintiffs have failed to do so. We conclude, for the reasons we discussed in *Edwards*, that there is a rational basis for retaining governmental immunity as to those persons receiving workers' compensation benefits.

We turn to plaintiffs' argument that the statute violates the Equal Protection Clause of the Fourteenth Amendment.[4] The right to sue the state is not a "fundamental right" requiring strict judicial scrutiny under a federal analysis, because it is not a right that is "explicitly or implicitly protected by the [United States] Constitution." *San Antonio School District v. Rodriguez*, 411 US

1, 16-17, 93 S Ct 1278, 36 L Ed 2d 17 (1973) *see also State v. Wagner*, 305 Or 115, 139, ___ P2d ___ (1988). Our conclusion that there is a rational basis for the statute under plaintiffs' state claim is equally applicable to their federal claim.

Affirmed.

FOOTNOTES

1 Article I, section 1, provides, in part, that "[w]e declare that all men, when they form a social compact are equal in right . . . ." Article I, section 10, provides, in relevant part, that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

2 Article I, section 20, provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

3 The author points out on page 228, n 43, that "*Olsen* predated the court's rejection of judicial balancing, and has not been followed. In *Hunter v. State*, 84 Or App 698, 735 P2d 1225 (1987), the Oregon Court of Appeals decided a criminal procedure case using the *Olsen* balancing test. The Supreme Court of Oregon allowed review and requested counsel to brief the question of *Olsen's* continuing validity." In *Hunter v. State of Oregon*, 306 Or 529, 533, ___ P2d (1988), the Supreme Court applied the *Clark* analysis, *see State v. Clark*, 291 Or 231, 240, 630 P2d 810, *cert den sub nom Clark v. Oregon* 454 US 1084 (1981), and did not discuss *Olsen*.

4 The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF OREGON
CA A45994

BARBARA JUNGEN, Plaintiff Appellant	*	ORDER DENYING RECONSIDERATION
ESTATE OF ALFRED JOHN JUNGEN Administrator	*	CA A45994 SC S35918
FREMONT INDEMNITY CO Plaintiff Appellant	*	
vs	*	
STATE OF OREGON, Defendant Respondent	*	
FREIGHTLINER WEST FOREST WOOD PRODUCTS CO, Defendants.	*	

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has, on MARCH 24, 1989, denied the petition. ORAP 10.10. The Supreme Court may now proceed to determine whether to grant review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 11.03.

/S/ GEORGE M. JOSEPH
CHIEF JUDGE
March 24, 1989

APPENDIX D

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DOUGLAS

BARBARA JUNGEN, Administratrix of the ESTATE OF ALFRED JOHN JUNGEN, and FREMONT INDEMNITY COMPANY, a California corportation, Plaintiffs, vs. THE STATE OF OREGON, FREIGHTLINER, a Delaware corporation, and WEST FOREST WOOD PRODUCTS COMPANY, an Oregon corporation, Defendants.	*	No. L86-2634 STIPULATION VACATING PRIOR JUDGMENT AND ENTERING NEW ORDER AND JUDGMENT OF DISMISSAL

IT IS HEREBY STIPULATED by and between the plaintiffs and the STATE OF OREGON, through their attorneys of record, that the original order and judgment of dismissal, submitted after telephonic hearing on August 17, 1987 upon the Motion to Dismiss Defendant STATE OF OREGON, dismissing defendant STATE OF OREGON and granting the STATE OF OREGON costs, is hereby vacated. The following shall supercede said vacated Order and Judgment of Dismissal.

IT IS HEREBY ORDERED AND ADJUDGED:

1. Defendant STATE OF OREGON's motion to dismiss plaintiffs' amended complaint as against said defendant is granted.

2. Plaintiffs shall have and recover nothing herein of defendant STATE OF OREGON.

3. Defendant STATE OF OREGON shall have and recover of plaintiffs its costs.

4. It is hereby expressly determined that there is no just reason for delay in entering final judgment against plaintiffs and in favor of defendant STATE OF OREGON, only and the court directs the entry of final and appealable judgment, pursuant to ORCP 678.

Dated: 9/1/87

HALKIDES & MORGAN

/S/ DENNIS HALKIDES
G. DENNIS HALKIDES
Attorneys for Plaintiffs

Dated: 9/4/87

/S/ LUTHER L. JENSEN
LUTHER L. JENSEN
Attorney for Defendant
STATE OF OREGON

IT IS SO ORDERED.

/S/ JOAN G. SEITZ
JUDGE OF THE CIRCUIT COURT
Dated: 9/11/87